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May 12, 1995

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**BY HAND DELIVERY**
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Santa Monica Community College District
Application for New Noncommercial FM Station
Mojave, California
File No. BPED-920305ME
MM Docket No. 94-71

Dear Mr. Caton:

On behalf of California State University, Long Beach Foundation, there are transmitted herewith an original and six (6) copies of its "Comments on Motion to Grant Pending Application," filed in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with the undersigned.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.

Patricia A. Mahoney
Counsel for California State University,
Long Beach Foundation

PAM:mah
Enclosures

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BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

| | | |
|---|---|---|
| In re Application of | ) | MM Dkt. No. 94-71 |
| | ) | |
| SANTA MONICA COMMUNITY COLLEGE DISTRICT | ) | File No. BPED-920305ME |
| | ) | |
| For a Construction Permit for a New Noncommercial FM Station at Mojave, California | ) | |



To: The Honorable Joseph Stirmer
Chief Administrative Law Judge

**COMMENTS ON**
**MOTION TO GRANT PENDING APPLICATION**

California State University, Long Beach Foundation (CSU), licensee of noncommercial educational station KLON(FM), Long Beach, California, by its attorneys, hereby respectfully submits its Comments on a Motion To Grant Pending Application ("Motion") filed on May 3, 1995, by Santa Monica Community College District ("SMCCD") in the above-captioned proceeding:

## I. Preliminary Statement

Although CSU was not permitted to intervene as a party to this proceeding and was not served with SMCCD's Motion, CSU has previously demonstrated in this proceeding that it has a pending application that is mutually exclusive with the above-captioned application of SMCCD. Thus, CSU's interests would clearly be adversely affected by grant of the Motion, since a grant of SMCCD's application would be effectively a denial of CSU's application. Accordingly, the Presiding Judge should

consider these Comments, notwithstanding his earlier ruling denying CSU leave to intervene in this proceeding.[1]

In its Motion, SMCCD asks the Presiding Judge to grant its above-captioned application, as amended to specify operation on Channel 201. SMCCD's application, however, is mutually exclusive with CSU's minor change application (BPED-940713IZ) to upgrade the licensed facilities of KLON, which operates on Channel 201 at Long Beach, California. The Presiding Judge cannot grant SMCCD's application; because to do so would be clearly contrary to Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). In the alternative, SMCCD asks the Judge to certify to the Commission the question of whether SMCCD's application should be granted forthwith. That request, too, should be denied. The Presiding Judge is required by Commission rules and precedent to return SMCCD's application to the Mass Media Bureau's application processing line.

**II. Grant Of The Application Would Violate CSU's Ashbacker Rights**

Grant of SMCCD's application at this time, when the Presiding Judge knows that there is a pending mutually exclusive application that was filed in good faith and that has not yet been consolidated with that of SMCCD, would clearly contravene the Supreme

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[1]CSU believes that the Judge erred in denying intervention to CSU and in not affording CSU notice and an opportunity to participate in the hearing conference that was called to consider CSU's Petition for Leave to Intervene. CSU did not even learn of the conference until after it was held. Even so, the fact that CSU did not seek reconsideration of the Judge's order denying CSU leave to intervene does not and can not in any way operate to deprive CSU of its right under Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), to have its application considered in a hearing with the application of SMCCD. CSU does not need to have its application consolidated with that of SMCCD in order to be able to intervene as a party in interest in this proceeding. Under these circumstances, CSU has a right to be heard on the issue of whether grant of the SMCCD application would be in the public interest.

Court's long standing decision in Ashbacker Radio Corp. v. FCC. There can be no question that CSU's and SMCCD's applications are mutually exclusive. At the October 21, 1994 prehearing conference in this proceeding, the Mass Media Bureau repeatedly referred to the mutual exclusivity of the applications. Likewise, the Bureau's Progress Reports submitted in this proceeding have referred to the mutual exclusivity between the two applicants.[2] Even SMCCD concedes in its Motion that the applications "conflict from an engineering perspective...." Motion at ¶ 6.

Since the applications are mutually exclusive, the Presiding Judge cannot grant the SMCCD application because to do so would deprive CSU of the right to have its application considered with that of the amended SMCCD application:

> "For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing."

Ashbacker, 326 U.S. at 330. In Ashbacker, the Court noted that, "[a]pparently no regulation exists which, for orderly administration, requires an application for a frequency, previously applied for, to be filed within a certain date. Nor is there any question that petitioner's aplication...was not filed in good faith." Id. at 333 n. 9.

The Commission's cut-off rules were designed to provide the regulations for orderly administration that the Supreme Court found lacking in Ashbacker. See Ridge Radio Corp. v. FCC, 292 F.2d 770, 772-73 (D.C. Cir. 1961). However, there is a gap in the Commission's broadcast cut-off procedures. The cut-off procedures do not expressly provide for issuance of a new cut-off list and notice to the public when an

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[2] See, e.g., Mass Media Bureau's Progress Report filed November 21, 1994, at 2, ¶2.

applicant changes frequency in a hearing. CSU's position vis-a-vis SMCCD's application is thus very similar to Ashbacker Radio Corporation's position in the Ashbacker case. CSU had no knowledge or notice of SMCCD's July 5, 1994 amendment when CSU filed its mutually exclusive application on July 13, 1994. **There was no public notice whatsoever of SMCCD's tendered amendment on or before July 13, 1994, when CSU filed its application, or on July 21, 1994, when CSU's application was accepted.** No rule, policy, or precedent exists that provides or even suggests that the mere filing of SMCCD's amendment cut-off CSU's application.

SMCCD devotes a significant portion of its Motion to its argument that CSU had "constructive" notice of the **acceptance** of the SMCCD amendment on July 25, 1994, when the Memorandum Opinion and Order (MO&O) of the Presiding Judge accepting the SMCCD amendment to change channels to 201 was released. Even if that were true,[3] it would be wholly irrelevant. The relevant issue under Ashbacker is whether CSU

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[3]The Presiding Judge's July 25, 1994 MO&O did not provide notice to CSU. No actual notice was provided, as such orders are mailed only to hearing participants. CSU was not a participant in this proceeding and did not receive a copy of the MO&O.

Moreover, there was no way CSU could have known of the MO&O unless it was a party to the proceeding. The Presiding Judge's MO&O was not included in the Daily Digest of documents released to the public by the Office of Public Affairs on July 25, 1994, attached hereto as Exhibit 1. Unlike other documents issued by the Commission and bearing "released" dates, interlocutory orders issued by presiding judges are not routinely listed on the Daily Digest and released to the public through the Commission's Office of Public Affairs. Instead, the Commission periodically releases to the public a **News** release entitled **Action In Docket Cases**, which provides summaries of recent orders of the Judges and the General Counsel in docketed proceedings. Even these summaries, however, do not constitute notice of actions taken in the orders. See MCI v. FCC, 515 F2d 385, 394 (D.C. Cir. 1974).

Moreover, the summary of the Presiding Judge's July 25, 1994 MO&O that was published on July 29, 1994, made no mention of SMCCD's amendment to Channel 201 (or of any SMCCD amendment at all) and, thus, could not have constituted notice of SMCCD's intended use of Channel 201. See copy attached as Exhibit 2.

had notice of the SMCCD amendment **when CSU filed its application on July 13, 1994.** CSU clearly did not have such notice, and SMCCD has not demonstrated that it did. By July 25, 1994, the date on which SMCCD has fixated, CSU had already filed its minor change application (two weeks earlier) and that application had already appeared on a Commission public notice as having been accepted for filing.

As the Court in Ridge Radio held, the Commission has the authority to adopt cut-off dates and rules and to construe them to mean that, unless filed before the cut-off date, an application may not be consolidated with an application previously filed.

> "But in carrying out the rule so construed the Commission may not, however inadvertently, give public notice of a cut-off date which does not fairly advise prospective applicants of what is being cut off by the notice."

292 F.2d at 773. There was no cut-off list issued to reflect SMCCD's amendment. Acceptance of that amendment two weeks after the filing of CSU's application can not operate to cut off CSU's application and/or deprive CSU of its right to a hearing.[4]

The issue of whether CSU should have appealed the Presiding Judge's MO&O before it became final is also irrelevant. Even if CSU had actual or constructive notice of the July 25, 1994, MO&O, that fact in no way could deprive CSU of its Ashbacker rights. The Presiding Judge has not yet granted SMCCD's application, as amended. It is the grant of SMCCD's application that CSU opposes, not SMCCD's right to specify Channel 201 or to settle with Living Way. CSU has vigorously opposed grant of

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[4]For the same reason, the fact that SMCCD's application **for Channel 204** appeared on a cut-off list two years earlier also cannot operate to cut-off CSU's rights when SMCCD decided to change channels two years later, unless CSU's current application would have conflicted with SMCCD's application for Channel 204, which is not the case.

SMCCD's amended application without consolidated consideration of SMCCD's application with CSU's application. Since the July 25, 1994 order did not grant SMCCD's application, and since there has been no order granting SMCCD's application, it is not too late for CSU to protest a grant of SMCCD's application. Moreover, as the Bureau points out, any appeal of the July 25, 1994, MO&O had to have been filed within five (5) days. Section 1.301(a) and (b) clearly restrict appeal rights to a party. CSU was not a party to this proceeding on July 25, 1994 or at any time thereafter. CSU had no notice or knowledge of the existence of SMCCD's amendment and the Judge's MO&O until August 22, 1994. Thus, CSU could not have timely appealed the Judge's MO&O.

**In stark contrast, SMCCD had ACTUAL NOTICE of the filing and acceptance of CSU's application on channel 201 four days before SMCCD received notice of the Judge's order approving its settlement agreement and accepting its amendment to change channels to 201.** SMCCD had **ACTUAL** public notice of the filing of CSU's mutually exclusive application when CSU's application was listed in an official Public Notice released to the public on July 21, 1994, Report No. 15856. On that date SMCCD knew that an order accepting its own amendment had not yet been released and knew that its application was no longer grantable. SMCCD did nothing. If SMCCD had not wanted the Judge's approval of its settlement agreement to become final unless and until SMCCD was certain it could receive a grant of its application as amended to specify operation on Channel 201, it was incumbent upon SMCCD--not CSU--to make sure that approval of the settlement agreement did not become final until

its mutual exclusivity with CSU was resolved. SMCCD could easily have requested that the Judge withhold action, or, if he had already adopted an order, that it be rescinded or reconsidered or the effective date be stayed, in light of the filing of CSU's mutually exclusive application. SMCCD could have at the very least advised the Presiding Judge of the mutually exclusive application on Channel 201.

SMCCD chose to let the Judge approve its Settlement Agreement and accept its amendment knowing full well that there was a competing application on file. SMCCD chose to oppose CSU's application, because of its mutual exclusivity with SMCCD's own application, as amended. **SMCCD chose to let the Judge's MO&O become final**. SMCCD urged the Presiding Judge again to grant its application on September 1, 1994, when it filed its FAA amendment, knowing full well but failing to disclose to the Judge that there was pending an application (which had already appeared on public notice before the acceptance of SMCCD's own amendment) that was mutually exclusive with SMCCD's own application as amended.

There is no reason to certify any question to the Commission. There is no reason to be swayed or persuaded by any claim that SMCCD is somehow now unfairly caught by having amended to Channel 201 to avoid a comparative hearing with Living Way and suddenly facing a comparative hearing with CSU.

## III. The Commission's Rules Require That SMCCD's Application Be Returned To The Processing Line

While the Commission's "cut-off" rules contain a gap regarding channel changes in hearing, there is no such gap or ambiguity in Section 73.3605 of the Rules. As the Bureau contended in the March 7, 1995, hearing conference in this proceeding, that rule

requires the Presiding Judge to return SMCCD's application to the Mass Media Bureau's application processing line. Section 73.3605(b)(3) provides:

> "In any case where a conflict between applications will be removed by an agreement for an engineering amendment to an application, the amended application shall be removed from hearing status upon final approval of the agreement and acceptance of the amendment."

Section 73.3605(c) provides:

> "An application for a broadcast facility which has been designated for hearing and which is amended so as to eliminate the need for hearing or further hearing on the issues specified, other than as provided for in paragraph (b) of this section, will be removed from hearing status."

Under both subsection (b)(3), which the Bureau discussed at the March 7 conference, or (c), which the Bureau discusses in its "Mass Media Bureau's Comments on Motion to Grant Pending Application," SMCCD's application must be removed from hearing status and returned to the processing line.

CSU was not notified by the Judge of the March 7, 1995 prehearing conference and was not a participant in that proceeding. However, CSU's counsel was an observer at the conference. From the discussion at the conference, and as reflected in the transcript, one reason the Presiding Judge was reluctant to send the SMCCD application to the processing line was a question of timing. He expressed his view that, if the Bureau would consolidate CSU's application with that of SMCCD, he could "have a hearing and the case decided in four months, or five months." TR. 69. With the freeze on the processing of noncommercial comparative decisions, adopted March 17, 1995, there is no reason now not to send SMCCD's application back to the processing line.

Also at the Prehearing Confeence on March 7, 1995, neither the Bureau nor SMCCD were aware of any cases construing Section 73.3605. That is no longer the

case. The Bureau is now aware of the Review Board's decision in Cabool Broadcasting Corp., 56 F.C.C. 2d 573 (Rev. Bd. 1975). That case is still good law. The case has not been overruled, criticized, questioned, or otherwise weakened as precedent. There is no reason to believe it is no longer "valid."

In Cabool, the Broadcast Bureau contended that an applicant's amendment to specify a new channel so as to resolve the mutual exclusivity between two pending applications required return of the amended application to the processing line, under Section1.605(c), which was subsequently renumbered 73.3605(c). The Review Board stated:

> "We agree with the Broadcast Bureau that §1.605(c) is applicable here and that its plain meaning is that an application is to be taken out of hearing status when it is amended so as to remove the need for a hearing."

56 F.C.C. 2d at 575.

The Board held, however, that the rule could be waived if it could "be determined that the rights of other interested applicants to comparative consideration for the new channel are not impaired." In the case before it, the Board observed that "throughout the lengthy adjudicatory and rule making procedures ..., no other party ha[d] sought to apply for the existing or new channels involved here." Id. at 576. Thus, the Board concluded that the rule could be waived in that case.

SMCCD has not requested a waiver of Section 73.3605(b) or (c), nor could the Judge grant such a waiver since the test used by the Board in Cabool is not met with respect to SMCCD's application. Unlike the facts in Cabool, **the right of CSU to comparative consideration** for Channel 201 **would be impaired**. CSU has applied for

the channel at issue. Therefore, SMCCD's application must be taken out of hearing status and returned to the processing line.

## IV. Conclusion

As has been demonstrated above, the Presiding Judge cannot grant SMCCD's application because CSU has on file a minor change application that was acceptable when filed and was in fact accepted before SMCCD's amendment proposing to operate on the same channel as CSU's station KLON was accepted. The SMCCD application, as amended, and the KLON minor change application are mutually exclusive. To grant SMCCD's application would be to deny CSU's application.

There is no need to certify any question to the Commission. The Commission's rules and precedents are clear and unambiguous. SMCCD's application must be removed from hearing status and returned to the processing line.

If the Presiding Judge decides nevertheless to hold a further conference on these issues, or if he decides to certify any question relative to this issue, he should permit CSU to participate in this proceeding. This proceeding is not benefitted by a refusal to permit CSU to participate.

Respectfully submitted,

CALIFORNIA STATE UNIVERSITY,
LONG BEACH FOUNDATION

By: Patricia A. Mahoney
Patricia A. Mahoney
Ann Bavender

Its Attorneys

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 N. 17th Street, 11th Floor
Rosslyn, Virginia 22209
(703) 812-0400
May 12, 1995

**EXHIBIT 1**

# DAILY DIGEST

**Federal Communications Commission**
**1919 - M Street, N.W.**
**Washington, D. C. 20554**

*News media information 202 / 632-5050*
*Recorded listing of release and texts*
*202 / 632-0002*

These are unofficial announcements of Commission actions. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 2d 385 (D.C. Circ. 1974). A list of other releases and documents made available today also is included.

Vol. 13, No. 137

July 25, 1994

## PUBLIC NOTICES

NOTICE OF RECEIPT OF FOREIGN AM BROADCAST STATION NOTIFICATION

TARIFF TRANSMITTAL PUBLIC REFERENCE LOG: July 22

TARIFF TRANSMITTAL PUBLIC REFERENCE LOG INFORMATIONAL TARIFFS: July 22

Report No. CL-94-88 - COMMON CARRIER PUBLIC CELLULAR RADIO SERVICE INFORMATION

## TEXTS

EMERY TELEPHONE - CASTLE DALE, UT. Notified Emery of an apparent liability for a forfeiture in the amount of $4,000 for willful and repeated violations of the Commission's rules by continuing to operate on frequencies 454.250 MHz and 454.400 MHz at Castle Dale, without authorization. (By NAL [DA 94-797] adopted July 13 by the Chief, Mobile Services Division, Common Carrier Bureau)

EMERY TELEPHONE - EMERY, UT. Notified Emery of an apparent liability for a forfeiture in the amount of $4,000 for willful and repeated violations by operating on frequencies 454.325 and 454.275 MHz at Emery, without authorization. (By NAL [DA 94-800] adopted July 13 by the Chief, Mobile Services Division)

EMERY TELEPHONE - FERRON, UT. Notified Emery of an apparent liability for a forfeiture in the amount of $4,000 for willful and repeated violations of the Commission's rules by operating on frequency 152.78 MHz at Ferron without authorization. (By NAL [DA 94-799] adopted July 13 by the Chief, Mobile Services Division)

EMERY TELEPHONE - HORN MOUNTAIN, UT. Notified Emery of an apparent liability for a forfeiture in the amount of $4,000 for willful and repeated violations of the Commission rules by operating on frequencies 152.54 MHz and 152.66 MHz at Horn Mountain, without authorization. (By NAL [DA 94-801] adopted July 13 by the Chief, Mobile Services Division)

EMERY TELEPHONE - ORANGEVILLE, UT. Notified Emery of an apparent liability for a forfeiture in the amount of $4,000 for willful and repeated violations of the Commission's rules by operating on frequencies 459.250 MHz, 459.400 MHz, 152.69 MHz, and 454.525 Mhz at Horn Mountain, without authorization. (By NAL [DA 94-798] adopted July 13 by the Chief, Mobile Services Division)

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ADDENDA: The following items released July 22 were not listed on Digest 136:

## NEWS RELEASE

CABLE SERVICES BUREAU RELEASES SPREADSHEET VERSION 2.1 OF FCC 393

## PUBLIC NOTICES

Report No. 234 - MASS MEDIA BUREAU CALL SIGN ACTIONS/NEW OR MODIFIED CALL SIGNS

Report No. 996 - CABLE TELEVISION SERVICE REGISTRATIONS; SPECIAL RELIEF AND SHOW CAUSE PETITIONS

Report No. 15856 - BROADCAST APPLICATIONS

(over)

Report No. 21935 - BROADCAST ACTIONS

Report No. DBS/PN 94-12 - DIRECT BROADCAST SATELLITE APPLICATION GRANTED

Report No. 1753 - PRIVATE RADIO BUREAU ACTIONS - July 11 through July 14

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TEXTS

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PERSONAL COMMUNICATIONS SERVICES. Amended Part 24 of the Commission's rules to establish new personal communications services in the 2 GHz band. (Gen Docket No. 90-314 by Further Order on Reconsideration [FCC 94-195] adopted July 22 by the Commission)

ERRATUM to MO&O [FCC 94-144] released June 13, 1994, in the matter of amending the Commission's rules to establish new personal communications services. (Gen. Docket No. 90-314)

PUBLIC CELLULAR TELECOMMUNICATIONS RADIO SERVICE. Addressed issues in a multi-party case to determine various lottery related issues. (CC Docket No. 91-142 by Decision [FCC 94R-12] adopted June 27 by the Review Board)

**EXHIBIT 2**

# NEWS

**Federal Communications Commission**
**1919 - M Street, N.W.**
**Washington, D. C. 20554**

News media information 202 / 632-5050
Recorded listing of release and texts
202 / 632-0002

44091




Report No. DC-2630 ACTION IN DOCKET CASES July 29, 1994

BY THE REVIEW BOARD ON THE DATES SHOWN:

ALABAMA, ARKANSAS, ET AL. (ALGREG CELLULAR ENGINEERING, ET AL.) CELLULAR PROCEEDING. Cancelled forfeitures imposed against Satellite Cellular Systems, Cellular Pacific, North American Cellular, and Crystal Communications Systems; dismissed, revoked, and authorized continued operations for various entities in the Domestic Public Cellular Telecommunications Radio Services on Frequency Block A in various markets. (By Decision FCC94R-12 June 27) (CC Docket 91-142)

LAJAS, PR. (RAMON AND RODRIGUEZ AND ASSOCIATES, INC. AND DAVID ORTIZ RADIO CORPORATION) FM PROCEEDING. Affirmed decision of the ALJ and granted the application of Ramon Rodriguez and Associates, Inc. for a new FM station at Lajas; denied the competing application of David Ortiz Radio Corporation. (By Supplemental Decision FCC94R-10 June 21) (MM Docket 86-510)

BY ALJ JOSEPH STIRMER ON THE DATE SHOWN:

LANCASTER, CA. (SANTA MONICA COMMUNITY COLLEGE DISTRICT AND LIVING WAY MINISTRIES) ED-FM PROCEEDING. Granted settlement agreement between Santa Monica Community College District and Living Way Ministries; resolved air hazard issue in favor of Living Way Ministries and granted its application for a new non-commercial FM station on Channel 205A at Lancaster. (By MO&O July 21) (MM Docket 94 -71)

-FCC-

## CERTIFICATE OF SERVICE

I, Mary A. Haller, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that true copies of the foregoing "Comments on Motion to Grant Pending Application" were sent this 12th day of May, 1995, by first-class United States mail, postage prepaid, to the following:

The Honorable Joseph L. Stirmer*
Federal Communications Commission
2000 L Street, N.W., Room 224
Washington, D.C. 20554

Gary Schonman, Esquire*
Hearing Branch
Mass Media Bureau
Federal Communications Commission
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Washington, D.C. 20005

*BY HAND DELIVERY

Mary A. Haller

Mary A. Haller